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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

FRANK TALLEY,

Petitioner,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE,
Howard L. Fryett, Dennis P. Adams,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Montana

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where speech was held not to involve a matter of public interest or concern, but rather to involve a private, employment-related issue, namely Petitioner's rights under an employment contract and his demand to teach classes which he previously taught and which had been dropped by the college, was summary judgment properly granted to Respondents on Petitioner's free speech claim?

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STATEMENT OF THE CASE

Respondents respectfully disagree with Petitioner's Statement of Grounds and Statement of the Case. Petitioner falsely represents that "the Montana Supreme Court decided a fundamental question of federal law in a way that conflicts with over 50 years of applicable decisions of this Court." (Petition for Writ of Certiorari, pp. 4-5.)

That is **not** true! The Montana Supreme Court's decision was completely consistent with federal decisions and well-established precedent of this Court! The Montana Supreme Court recognized that the First Amendment protects free speech in regard to matters of public concern, but does not apply in matters of private concern, consistent with the decisions of this Court and the federal courts. Citing the precedent of this Court, the Montana Supreme Court stated:

> "The First Amendment protects speech of public employees upon matters of public concern. This furthers the purpose of the First Amendment to 'assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' ***Connick v. Meyers***, 461 U.S. 138, 145, 75 L.Ed.2d 708, 718, 103 S.Ct. 1684, 1689 (1983). (Citation omitted.)" ***Talley v. Flathead Community College***, 903 P.2d 789, 791 (Mont. 1995).

The Montana Supreme Court recognized that Petitioner's case involved matters of private concern, namely his claim of a "right" to continuing employment as a part-time instructor and his demand that he be allowed to teach classes which the college had dropped because of

budgetary constraints. Consistent with federal precedent, the Montana Supreme Court stated that, under these circumstances, there is no constitutionally-protected free speech. The court stated:

> " . . . the First Amendment does not provide immunity for speech concerning matters only of personal interest to the public employee. ***Connick***, 461 U.S. at 147, 103 S.Ct. at 1690. This assures government employees the same rights as those who do not work for the government. Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. ***Connick***, 461 U.S. at 147-48, 103 S.Ct. at 1690-91. The inquiry into the protected status of speech is one of law, not fact. ***Connick***, 461 U.S. at 148, n. 7, 103 S.Ct. at 1690, n. 7." ***Talley***, 903 P.2d at 791.

The Montana Court held that Petitioner did not have a free speech claim because his case concerned matters of private interest, namely a determination of rights as a part-time instructor under his employment contract and his demand to teach classes which he previously taught and which were dropped.

STATEMENT OF FACTS

Respondents respectfully disagree with Petitioner's Statement of Facts. Petitioner's Statement of Facts were not the facts found by the trial or appellate court.

Petitioner Frank Talley was employed as a part-time instructor at Flathead Valley Community College from

1982 to 1989, under a series of term contracts as a part-time philosophy and religious studies instructor. During the spring quarter of 1989 the college, for budgetary reasons, chose to no longer offer Petitioner's classes. The classes of other instructors were dropped by the college as well.

Upon learning that his classes would no longer be offered, Petitioner asserted his belief that, as a part-time instructor, he held a right of continuing employment to teach his classes although the clear language of his employment contracts failed to reasonably support such a belief. Petitioner, through his attorney, made demand on the college for reinstatement of the classes and his "right" to teach them.

Respondents replied to the demand, through their attorney, by advising Petitioner that any claim of a continuing right of employment was totally unsupported by the language of his employment contracts. Despite such advice, Petitioner continued to demand further employment by the college and threatened that any further employment by the college would be used against it. His attorney stated that, if the college further employed Petitioner, any subsequent employment would support his claim of a right to continuing employment. The attorney's letter threatened: "[I]f [Talley] is employed, it will tend to look as though the college has followed through with its intent to continuously employ my client."

Respondents, through their attorney, asked Petitioner to disavow any expectation of continued employment and discontinue his threat to use future employment as an argument against the college. Respondents' counsel

stated: "In the absence of such a disavowal and acknowledgment, I must advise [FVCC] . . . not to employ Mr. Talley for summer quarter and to employ him very sparingly thereafter." The attorneys for the parties repeated their positions in subsequent letters.

In October of 1989, Petitioner filed a complaint against the college, listing multiple claims for relief against it for its failure to re-hire him. The trial court granted summary judgment on most of the claims, and Petitioner appealed the granting of summary judgment to the Montana Supreme Court. See ***Talley v. Flathead Community College***, 259 Mont. 479, 857 P.2d 701 (1993). In the first appeal, the Montana Supreme Court held that the language of the term contracts was plain and clearly set forth and did not support any right or claim to continuing employment. The court remanded the case to the trial court, however, on the slander and free speech claims, not ruling on the merits of either claim.

Trial was held on the slander claim, whereupon the jury returned a verdict for Respondents. The trial court also ruled upon the merits of the free speech claim, giving Respondents summary judgment and holding that the claim did not fall within the purview of constitutional protections, since it involved a matter of private and not public concern. The trial court held that the claim concerned the scheduling of his classes and Petitioner's assertion of employment rights.

The trial court's decision was affirmed by the Montana Supreme Court in ***Talley v. Flathead Community College***, 903 P.2d 789 (Mont. 1995). In the second appeal,

the Court held that the record established that Petitioner's primary motivation for his statements was his desire for more teaching contracts for himself. The court rejected and distinguished Petitioner's attempt to compare his case to ***Trotman v. Board of Trustees of Lincoln University***, 635 F.2d 216 (3rd Cir. 1980), which involved a widespread dispute between teacher and administrators in a university, and which was decided before ***Connick, supra***. The Court noted with approval the decision of ***Dorsett v. Bd. Of Tr. For St. Colleges & Univ.***, 940 F.2d 121 (5th Cir. 1991), where the court held that grievances or complaints about the subject of class scheduling are not matters of public concern, but are instead personal or private employment grievances not within constitutionally protected "free speech" claims.

Petitioner then sought certiorari with this Court.

ARGUMENT

Summary of Argument

The Montana Supreme Court did not err in affirming the trial court's grant of summary judgment to the college on Petitioner's free speech claim. The question of whether speech is constitutionally protected is one of law for the court to decide. It is well-established that speech is not constitutionally protected when it involves matters of private, as opposed to public, concern. Matters pertaining to the scheduling of classes and the nature and extent of one's employment rights or grievances have been held to be matters of private concern. In this case, Petitioner's

complaints concerned the dropping of classes he previously taught and his assertion of an employment right which was not supported by the language of his contract. The trial court and the Montana Supreme Court were correct in holding that there was no free speech claim under the circumstances of this case.

DETAIL OF ARGUMENT
REASONS FOR DENYING THE WRIT

I. THE COURT DID NOT ERR IN AFFIRMING SUMMARY JUDGMENT UNDER THE CIRCUMSTANCES OF THIS CASE.

A. THE QUESTION OF WHETHER SPEECH IS CONSTITUTIONALLY PROTECTED IS ONE OF LAW.

In the analysis of a civil rights claim founded upon retaliatory exercise of the First Amendment right of free speech, the question of whether or not speech has constitutional protection is a legal question or a question of law. As the court stated in ***Stewart v. Parish of Jefferson***, 951 F.2d 681, 683 (5th Cir. 1992):

> "The inquiry into the protected status of speech is one of law, and as such, is subject to de novo review by this Court. See ***Kirkland v. Northside Independent School District***, 890 F.2d 794, 798 (5th Cir. 1989), ***cert. den.***, ___ U.S. ___, 110 S.Ct. 2620, 110 L.Ed.2d 641 (1990), ***Terrel v. University of Texas System Police***, 792 F.2d 1360, 1362 n. 2 (5th Cir. 1986), ***cert. den.*** 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987)."

The analysis of the speech itself or the language used – its content, context and form – is also a legal question and not one of fact. At issue is whether the speech involved is a private grievance or a matter of public concern. As another court has recognized:

> "Whether speech fairly related to a public concern or expresses a private grievance or matter of immediate self-interest must be determined by the content, the form, and the context of the speech. ***Connick***, 461 U.S. at 147-48, 103 S.Ct. at 1690. *And the issue is one of law, not fact, for the court to decide.* ***Id.*** at 148 n. 7, 103 S.Ct. at 1690 n. 7; ***Dwyer v. Smith***, 867 F.2d 184, 193 (4th Cir. 1989)." ***Stroman v. Colleton County School District***, 981 F.2d 152 (1993). (Emphasis added.)

As one court has recognized:

> " . . . We agree with the district court that Dorsett's speech did not address a matter of public concern and thus cannot form the basis of a claim under the First Amendment. *This issue is a question of law to be determined by the district court and to be reviewed de novo by the appellate court.* See ***Rankin v. McPherson***, 483 U.S. 378, 386 n. 9, 107 S.Ct. 2891, 2898 n. 9, 97 L.Ed.2d 315 (1987); ***Dodds v. Childers***, 933 F.2d 271, 271 (5th Cir. 1991)." ***Dorsett v. Bd. Of Tr. for St. Colleges & Univ.***, 940 F.2d 121, 124 (5th Cir. 1991). (Emphasis added.)

B. SPEECH IS NOT CONSTITUTIONALLY PROTECTED WHEN IT INVOLVES MATTERS OF PRIVATE, AS OPPOSED TO PUBLIC, CONCERN.

Where speech does not involve a matter of public concern, it is well established that no claim can be

brought. As this Court stated in ***Connick, supra*** at 147, 75 L.Ed.2d 719:

> " . . . We hold only that when a public employee speaks out not as a citizen not upon matters of public concern, but instead as an employee upon matters of only personal interest, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. (Citation omitted.) Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment. . . . "

Courts look to the content, context and form of communications to determine whether there is constitutional protection afforded under the First Amendment where the subject concerns employee grievances. For example, in ***Stewart v. Parish of Jefferson***, 951 F.2d 681, 683 (5th Cir. 1992), the court stated:

> "The issue of whether an employee's speech involves a matter of 'public concern' is a slippery inquiry, one which defies precise definition. It thus requires a case-by-case analysis, with careful consideration of the content, context and form of the statement. ***Kirkland***, 890 F.2d at 798. When a public employee speaks as an employee rather than as a citizen on matters that address his personal employment conditions, First Amendment protection is not invoked absent unusual circumstances. (Citations omitted.) This focus upon the role of the speaker is warranted by the realistic observation that almost anything that occurs within a public

> agency could be of concern to the public. (Citation omitted.)"

The same test is applied to employer's speech where employer suppression is alleged. Where the subject involves suppression on a matter of public and not private concern, civil rights relief is available under the law. ***Connick, supra.***

An employee has no civil rights claim for an employment-related grievance regarding an administrative change in policy. ***Stroman v. Colleton County School District,*** 981 F.2d 152 (1993). In ***Stroman,*** the Court stated:

> "Personal grievances, complaints about conditions of employment, or expressions about other matters of personal interest do not constitute speech about matters of public concern that are protected by the First Amendment, but are matters more immediately concerned with the self-interest of the speaker as an employee. ***Connick v. Meyers,*** 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983)." ***Stroman, supra*** at 156.

The instant case concerned matters of private concern. In his letter to the college's attorney and to the board of trustees of the college, Frank Talley complained about his classes being no longer offered at the college and demanded that they be reinstated and that he be allowed to teach them, pursuant to a claim of right to continuing employment which was unsupported by the language of his contracts.

C. MATTERS PERTAINING TO THE SCHEDULING OF CLASSES AND THE NATURE AND EXTENT OF ONE'S CONTRACTUAL EMPLOYMENT RIGHTS ARE MATTERS OF PRIVATE CONCERN.

Federal courts have also recognized that grievances or complaints about the subject of class scheduling is not a matter of public concern, but is a personal or private employment-related grievance not within constitutionally-protected "free speech" claims under the First Amendment. See ***Dorsett v. Bd. Of Tr. For St. Colleges & Univ.***, 940 F.2d 121 (5th Cir. 1991).

In ***Dorsett***, a tenured associate math professor brought a 42 USC 1983 civil rights claim against university officials for alleged harassment and violation of First Amendment rights. The professor alleged that he had been denied summer employment in retaliation by the administration for publicly supporting another professor who refused to lower academic standards. He alleged that his exercise of free speech on matters of public education caused the retaliation.

The Court disagreed:

> "Communication thus rises to the level of public concern if a person speaks primarily as a citizen rather than as an employee. See ***Id.; Thompson v. City of Starkville***, 901 F.2d 456, 461 (5th Cir. 1990). We must assess, therefore, Dorsett's motivation in complaining to the administration. After reviewing the summary judgment evidence, we conclude that Dorsett's complaints at the time of the alleged harassment reflected predominantly his concerns *about the assignment*

> *of summer and overload classes to himself and to his friends in the department. These concerns are matters of private, not public interest."* ***Dorsett, supra*** at 124. (Emphasis added.)

The Court went on to state:

> "Even when viewed in a light most favorable to Dorsett, *the evidence does not show that the primary motivation for his speech was his public concern about academic excellence. Instead, the evidence shows that Dorsett's primary motivation was his personal concern about the work environment and teaching assignments."* ***Dorsett, supra.***
>
> *"[C]omplaints that might rise above the purely personal level, but are instead expressed only as issues of employer favoritism, are personal grievances rather than issues of public concern.* (Citation omitted.)" ***Dorsett, supra.*** (Emphasis added).

Petitioner's case is no different. The record before this Court and the Montana Supreme Court establishes that he was primarily motivated by a desire for more teaching contracts for himself. His attorney's first letter of February 28, 1989 to the college president addressed the matter of his personal concerns and his asserted employment rights. The letter stated "On behalf of my client, I hereby respectfully demand you immediately reassess your class schedule for the Spring Quarter of 1989 and add both of ***my*** client's classes back to the list." (Emphasis added.) It also stated that "Frank has developed an expectation of continued employment" and that "I assume the college would not now terminate his employment without just cause." The second letter, a response by the college's attorney, disagreed with a claim of a right to continuing employment under the language

of his employment contracts. The letter stated that "the contracts under which he has been employed clearly and unequivocally state that such employment is for one quarter only and will not give rise to any right or expectation of future employment." The third, fourth and fifth letters between the attorneys repeated the various positions and demands.

This is the background and context of Petitioner's claims. The subjects at issue clearly concern private, employment-related grievances and administrative changes in policy and not matters of public concern. Thus, the trial court and the Montana Supreme Court were clearly correct in holding that Petitioner had no civil rights claim for infringement and/or suppression of any First Amendment right of free speech.

CONCLUSION

Petitioner's Petition for a Writ of Certiorari should not be granted. The trial court and the Montana Supreme Court were clearly correct in determining that Petitioner's free speech claim did not fall within the parameters of constitutionally-protected speech. It involved matters of private, as opposed to public, concern. Fundamentally, Petitioner's free speech claim concerned private employment rights, namely his claim of a right to continuing employment with the college, and his complaint about the college no longer offering classes he previously taught. Contrary to his assertion, the Montana Supreme Court did not ignore federal law or precedent in regard to free speech claims. It in fact recognized the parameters of

the *Connick* decision, and pursuant to the principles enunciated in *Dorsett*, held that Petitioner had no free speech claim.

WHEREFORE, Respondents respectfully request this Court to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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